Supreme Court of the United States

October Term, 1949

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CHARLES ELMORE CROPLEY

No. 608

GERALD MILLER and DAVID CAUDILL, for themselves and for the benefit of others similarly situated,
Appellants,

vs.

CITY OF SPOKANE, a municipal corporation; WILLIAM P. PAYNE, Commissioner of Public Safety; E. W. PARSONS, Chief of Police; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAW and WALLACE N. SPROUL, City Commissioners, all public officials of the City of Spokane, Washington,
Appellees.

Appeal from the Supreme Court of the State of Washington

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' STATEMENT MAKING AGAINST JURISDICTION OR IN THE ALTERNATIVE APPELLEES' MOTION TO DISMISS OR AFFIRM.

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October Term, 1949

No. 608

GERALD MILLER and DAVID CAUDILL, for themselves and for the benefit of others similarly situated,
Appellants,

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CITY OF SPOKANE, a municipal corporation; WILLIAM P. PAYNE, Commissioner of Public Safety; E. W. PARSONS, Chief of Police; WILLARD TAFT, KENNETH LAWSON, ARTHUR R. MEEHAW and WALLACE N. SPROUL, City Commissioners, all public officials of the City of Spokane, Washington,
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Appeal from the Supreme Court of the State of Washington

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' STATEMENT MAKING AGAINST JURISDICTION OR IN THE ALTERNATIVE APPELLEES' MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE AND GROUNDS OF JURISDICTION

(c) This is an appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of the State of Washington, reversing a judgment of the

Superior Court of Spokane County, Washington, directing the issuance of a permanent injunction against the defendants from arresting or molesting plaintiffs and others similarly situated by virtue of having in their possession and operating pinball machines in the City of Spokane, Washington, and from seizing, confiscating and destroying such machines, and that such injunction shall remain in full force and effect until the electors of the City of Spokane shall have had an opportunity to exercise the right of referendum by a vote for or against the continued operation of pinball machines within the City of Spokane, Washington.

The City of Spokane, Washington, appealed from the judgment of the lower court, and the State Supreme Court reversed the trial court's decision and upheld the validity of Remington's Revised Statute 2472, Laws of 1909, Section 220, page 955, defining gambling devices, and decreeing that pinball machines were gambling devices within the above statute. The federal statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257 clause (2), Title 28, of the United States Code.

The statutes of the State of Washington or the city ordinances and charter provisions of the City of Spokane, Washington, together with portions of the Constitution, the validity of which is involved, so far as pertinent to this appeal, are: Article 11, Section 10 of the Constitution of the State of Washington; Section 83, Article IX, page 6 of the Charter and General Ordinances of the City of Spokane; Sections 12 and 13, Article III, page 1 of the Charter and General Ordinances of the City of Spokane; Section 10, Article III, page 1 of the Charter and General Ordinances of the City of Spokane; Remington's Revised Statute, Sec. 2472; Remington's Revised Statute, Sec. 2472-1, Laws of 1937; Remington's Revised Statute, 2472-2, Laws of 1937; Remington's Revised Statute, Section 8370-96, Laws of 1941; Remington's Revised Statute 8370-100,

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Laws of 1941, more specifically as set out heretofore by the appellants in their statement as to jurisdiction in the record 105, 106, 107, 108 and 109.

(d) A concise statement of the case is as follows:

The date of the judgment of the Supreme Court of the State of Washington sought to be reviewed is December 15, 1949, and the date upon which the application for appeal was presented is the 7th day of January, 1950.

The plaintiffs and respondents were owners and operators of pinball machines within the City of Spokane, Washington, and on March 28, 1949 the City Council passed an ordinance, C 10078, prohibiting the possession and operation of pinball machines, and repealing previous ordinances which authorized the operation and possession of pinball machines; and licensing, taxing, regulating and providing for the conduct, inspection and operation of the machines. (R. 83-84)

Prior to the effective date of Ordinance No. C 10078, a referendum petition satisfying the charter requirements was duly and regularly filed and a proper certification was affixed by the City Clerk, whereupon on May 13, 1949, the City Commissioners and Council reconsidered Ordinance No. C 10078 in order that said ordinance be submitted to a popular vote at the next municipal election. (R. 83-84) At the same date of the order referring the passage of the ordinance in question to a popular vote at the next municipal election, the City Council, by resolution, notified the owners of the pinball machines that all persons having machines in their possession after May 23, 1949 would be arrested. (R. 84)

Plaintiffs immediately sought the aid of the courts of equity in the Superior Court of the State of Washington in and for the County of Spokane, and sought and obtained an injunction against the defendants, prohibiting them from arresting the plaintiffs and others similarly situated,

and further enjoining the defendants from interfering with the operation of the machines or from their confiscation. (R. 83)

Ordinance No. C 10078 reads as follows:

"ORDINANCE NO. C 10078

An ordinance prohibiting the possession, maintenance, conduct, operation or use of pinball machines or other devices of like character for rewards, excepting slot machines in private clubs, wherein there enters an element of chance; providing penalties for the violation thereof; and repealing Ordinance No. C 9441, passed the City Council December 29, 1947.

The City of Spokane does ordain:

Section 1. Any person, firm or corporation who shall have in his or its possession or who shall conduct, maintain, operate or use, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character, other than slot machines in private clubs as provided by Ordinance No. C 10077, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits or any other thing or representative of value, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300) or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 2. That Ordinance No. C 9441, passed the City Council December 29, 1947, and entitled, 'An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, requiring the approval of premises where such machines are located, providing penalties for the violation thereof, and repealing Ordinance No. A 1250, passed the City Council November 11, 1902, and Ordinance No. C 8178, passed the City Council April 23, 1945,' be, and the same is hereby repealed.

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Section 3. This ordinance shall take effect and be in force thirty (30) days from and after its passage.

Passed the City Council March 28, 1949.

ARTHUR R. MEEHAN
Mayor

Attest: Alex Brown
City Clerk

Approved as to form:

.....
Corporation Counsel "

and it is upon this Ordinance that the referendum became effective. This Ordinance sought to repeal Ordinances C 9441, Ordinance No. A 1250 and Ordinance No. C 8178.

These ordinances read respectively as follows:

"ORDINANCE NO. C 9441 (by Payne)

An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, requiring the approval of premises where such machines are located, providing penalties for the violation thereof, and repealing Ordinance No. A 1250, passed the city council November 11, 1902, and Ordinance No. C 8178, passed the city council April 23, 1945.

The City of Spokane does ordain:

Section 1. It shall be unlawful for any person, firm or corporation who conducts, maintains, or operates, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any pinball machine or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value to permit or allow any person under the age of twenty-one years to play or operate the same.

Section 2. It shall be unlawful for any person under the age of twenty-one years to play or operate any pinball machine or any other automatic or mechanical

device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value.

Section 3. It shall be unlawful for any person, firm or corporation to place any pinball machine or any other device of like character in any premises, the location of which has not been first approved by the commissioner of public safety.

Section 4. The commissioner of public safety shall make such rules and regulations as may be necessary to carry into effect the provisions of this ordinance and for its proper operation, which rules and regulations shall be filed with the city clerk and when so filed shall have the force and effect of law.

Section 5. The commissioner of public safety may suspend or revoke any location approval at any time when in his opinion the further operation of pinball machines or other devices of like character in operation at a particular location would be detrimental to the public peace or morals, or for the violation of any of the provisions of this ordinance or of any rule or regulation promulgated thereunder. The commissioner of public safety shall cause to be served upon the person who is in charge of any approved location and upon such parties as he may deem to be interested therein such reasonable notice as he may determine to be proper of his intention to suspend or revoke his location approval. There shall be included or attached to such notice a statement of the facts constituting the violation charged. Within three days after receipt thereof, such parties shall be entitled to a hearing before the commissioner of public safety. The action of the commissioner of public safety shall be conclusive and not subject to review. It shall be unlawful for any person, firm or corporation whose location approval has been suspended or revoked as herein provided to operate any pinball machine or device of like character at said location during the period of suspension or after revocation.

Section 6. Any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and, upon conviction thereof,

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shall be punished by a fine in any sum not exceeding Three Hundred Dollars ($300.00), or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 7. That Ordinance No. A 1250, passed the city council November 11, 1902, and entitled, 'An ordinance to prohibit the maintaining, conducting, operating or using automatic nickel-in-the-slot machines, or other devices of like character, wherein there enters an element of chance,' be, and the same is hereby, repealed.

Section 8. That Ordiance No. C 8178, passed the city council April 23, 1945, and entitled, 'An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, providing penalties for the violation thereof, and declaring an emergency,' be, and the same is hereby, repealed.

Section 9. This ordinance shall take effect and be in force thirty days from and after its passage.
Passed the city council December 29, 1947.

ARTHUR MEEHAN, Mayor

Attest: A. A. BROWN, City Clerk "

SLOT MACHINES

ORDINANCE NO. A 1250

An ordinance to prohibit the maintaining, conducting, operating or using automatic nickel-in-the-slot machines, or other devices of like character, wherein there enters an element of chance.

The City of Spokane does ordain as follows:

Section 1. Any person or persons who shall conduct, maintain or operate, either as owner or owners, proprietor or proprietors, lessee or lessees, employee or employees, agent or agents, any automatic nickel-in-the-slot machine, or other device of like character, wherein there enters an element of chance, whether the same be played or operated for money, checks, credits,

or any other thing or representative of value redeemable in money, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars, and in default of the payment of the fine imposed shall be imprisoned in the city jail one day for each two dollars thereof.

Section 2. For the purposes of trial and conviction under this ordinance, the possession of any such machine or device that automatically pays money, or checks, or slugs, and commonly known as a cash machine, or keeping the same in any place accessible to the public, shall be prima facie evidence against the person in possession thereof of guilt under this ordinance.

Section 3. This ordinance shall take effect and be in force ten days after its passage.

Passed the city council November 11, 1902. "

ORDINANCE NO. C 8178 (By Colburn)

An ordinance relating to public morality and good order in the City of Spokane, prohibiting the playing of pinball machines and devices of like character by persons under the age of twenty-one years, providing penalties for the violation thereof, and declaring an emergency.

The City of Spokane does ordain:

Section 1. It shall be unlawful for any person, firm or corporation who conducts, maintains or operates, either as owner or owners, proprietor or proprietors, lessee or lessees, employe or employees, agent or agents, any pinball machine, or any other automatic or mechanical device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value to permit or allow any person under the age of twenty-one years to play or operate the same.

Section 2. It shall be unlawful for any person under the age of twenty-one years to play or operate any pinball machine or any other automatic or mechanical

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device of like character which may be played or operated for money, checks, credits, rewards or any other thing or representative of value.

Section 3. Any person, firm or corporation violating any of the provisions of this ordinance, upon conviction thereof, shall be punished by a fine of not more than $300, or by imprisonment in the city jail for a period not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 4. An urgency and emergency for the passage of this ordinance is hereby declared to, and does, exist, and the same shall take effect and be in force immediately upon its passage.

Passed the city council April 23, 1945.

F. G. SUTHERLIN, Mayor.

Attest: W. N. SPROUL, City Clerk"

The Supreme Court reversed the trial court on the grounds and for the reason that a pinball machine is a gambling device within the definition of Remington's Revised Statute 2472, Laws of 1909, and that neither the City Commissioners nor the people of the city have the power to enact an ordinance in conflict with a general law of the state. (R. 88)

The Supreme Court of the State of Washington assumed that at the municipal election Ordinance No. C 10078 would be defeated and would in effect legalize the operation of pinball machines. The Supreme Court was silent, however, on the right of the people to vote the machines out or make them unlawful under their referendum privileges as provided by the State Constitution and the Charter of the City of Spokane. The Supreme Court likewise held that Remington's Revised Statute 2472 was not repealed by Remington's Revised Statutes 2472-1, Laws of 1937, and Remington's Revised Statute 2472-2, Laws of 1937. The Court, however, was silent as to whether or not Remington's Revised Statute 2472 was not in fact repealed by Section

8370-100, Laws of 1941 Supplement, Remington's Revised Statutes.

The ruling of the trial court was such as to bring the case within the jurisdictional provisions heretofore relied on, in that the trial court held that the plaintiffs should be allowed to operate their lawful business until such time as the question was submitted to the electorate, and to deprive them of that right prior to the election would constitute an unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law, or without any process of law whatsoever. The ruling of the Supreme Court reversing the trial court's decision was such as to bring it within the jurisdictional provisions heretofore relied on, in that the Supreme Court of the State of Washington held that by virtue of Remington's Revised Statute 2472, Laws of 1909, prohibited plaintiffs from operating, and such prohibition by virtue of that statute was in fact due process of law.

The cases believed to sustain the jurisdiction of the United States Supreme Court are:

Craig v. *Harney*, 331 U. S. 367; 91 Law Edition 1546, p. 1551;

Ex rel McCollum v. *Board of Education*, 333 U. S. 203; 92 Law Edition, 648;

Treichler v. *State of Wisconsin*, Volume 94 Law Edition; Advance Opinions No. 1, p. 21.

Terminiello v. *Chicago*, Vol. 93 Supreme Court Law Edition, Advance Opinions p. 865, at p. 868.

"Here claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure, but whether claims are based upon a federal right or merely of local concern *is itself a federal question* on which this court and not the Supreme Court of North Carolina has the last say. That court could not put a

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> federal claim aside as though it were not in litigation by the talismanic word 'jurisdiction'. When an asserted federal right is denied the sufficiency of the grounds of denial is for this court to decide. Bullington could have come here not merely by the grace of this court on certiorari but on appeal."
>
> *Angel* v. *Bullington*, 330 U. S. 183, p. 188, 189
> 91 Law Ed. 832, p. 836

This appeal being from a state court, the grounds upon which it is contended that the questions involved are substantial is that the federal question sought to be reviewed was first raised in the trial court by virtue of pleadings in the Petition for Injunction. Paragraph XIV of plaintiffs' Petition for an Injunction reads as follows:

> "That the threatened arbitrary, inequitable, unlawful, and fraudulent action of the defendants in seizing and confiscating pinball machines which belong to the plaintiffs, and in arresting the plaintiffs, is a direct invasion and abridgement of plaintiffs' property rights as defined by the Fourteenth Amendment to the Constitution of the United States, in that said action on defendants' part constitutes and will constitute unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law or without any process of law whatsoever, and is a direct violation of Sections 3 and 12 of Article I of the Constitution of the State of Washington, in that said acts will deprive the plaintiffs of liberty and property without due process of law."

That the threatened arbitrary, inequitable, unlawful and fraudulent action of the defendants in seizing and confiscating pinball machines which belong to the plaintiffs and arresting the plaintiffs is a direct invasion and abridgement of plaintiffs' property rights as defined by the Fourteenth Amendment to the Constitution of the United States, in that said action on defendants' part constitutes and will constitute unlawful deprivation of plaintiffs' right to enjoy the use and possession of their property without due process of law, or without any process of law whatsoever. (R. 7)

The trial court held that the action of the City Council in effect deprived plaintiffs of their property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. (R. 38 to 54)

Quoting from Transcript of Proceedings, page 3, as follows:

> "You will observe, gentlemen, that the City Council, which is your legislative body, evidently took no action whatever upon the petition for referendum which had been certified by the City Clerk as having the required number of names to take the question of the enactment of the ordinances relating to pinball machines to a vote of the people of this city. It is not alleged that it was so ordered." (R. 40)

Quoting from Transcript of Proceedings, pp. 5 and 6.

> "
> . . . .
> "THE COURT: Yes, very well. I beg your pardon, Mr. Farley, you are quite correct. However, it will be stipulated that the City Council on the 13th day of May, 1949, moved and passed the resolution which I have just read, that is true, isn't it, or correct?
> "MR. FARLEY: Yes.
> "THE COURT: Now, the question of the legality or illegality of pinball machines will not be passed on at this time by me. I take it that the crux of this entire proceeding is whether or not the people of the City of Spokane shall be given the right to vote as provided in Section 83 of the Charter on referendum. Personally, I am very much in favor of referring questions to the people for their ultimate determination. It is an admitted fact that the advisory ballot taken on the question of the operation of slot machines and pinball machines at the recent election was merely advisory. Why it was done in that manner I do not know. You can draw your own inferences. Every legislative body has an inherent duty to act and perform their duties in a manner that is required under the law and the ordinance in the instant case of the City of Spokane. If I am wrong in my conclusion that the people of the city shall have a right

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to pass upon the question of the adoption of the ordinance in question the Supreme Court of this State will be very happy to correct my error and I hope that this case is taken to the Supreme Court for determination of the right of referendum on this question." (R. 6-7)

Quoting from Transcript of Proceedings, pp. 9 and 10.

"THE COURT: There has been no determination of that question. Then, as I understand you, Mr. Losey, you would deprive the people of the right to pass upon this ordinance notwithstanding Section 83 of the City Charter, adopted by the people many years ago, relating to the referendums.

". . .

"THE COURT: No, I thought it was understood, Mr. Farley, that from my views expressed to all of you, that the people, in my opinion, were entitled to the right of referendum on this question; that compliance had been made by ten percent or more of the total vote cast at the last election; that that vote had been certified by the City Clerk and that is merely a question of whether the people should be denied the right and privilege that they have reserved to themselves in their Charter and that I was of the view that they should not be." (R. 45-46)

Quoting from Transcript of Proceedings, pp. 14 and 15.

"THE COURT: Well, I think there is no question about that, no question at all, Mr. Schiffner. Let me point out to you, if you please, sir, that we have the right of referendum in this state and surely there is no prohibition in any of the state laws in respect to the right of referendum as reserved in the City Charter of Spokane." (R. 49-50)

Quoting from pp. 19 and 20, Transcript of Proceedings.

"THE COURT: . . .
Now, perhaps, this is the way to get at it but still you would deny the right of the people to pass upon the question of whether they wished the ordinance to be enacted and in effect controlling pinball machines.

". . .

"Gentlemen, it is my opinion that the injunction should be continued in force and effect until such time as the

> city commissioners or city council of Spokane calls an election, either special or regular, to refer the matter or the question to the people of the City of Spokane, and until the final result of that vote there is no determination." (R. 53-54)

The State Supreme Court did not pass upon or discuss the federal constitutional question involved under the due process clause of the Fourteenth Amendment to the Constitution other than by inference where it states:

> "The argument has been made that, in the interest of local self-government, the ordinance should be submitted to the people of Spokane for their approval or rejection. The contention would be unanswerable were it not for the constitutional provision contained in Art. XI, Sec. 10, and our laws as passed by the legislature. All acts of the people and their representatives, regardless of the virtue of those acts, must yield to the provisions of our constitution." (R. 88)

It will be observed that under this language and the construction of the state statutes involved in this case, as well as the ordinances and portions of the state constitution, that the people are refused the privilege of enacting a local ordinance the same or similar to an existing state law. The State Supreme Court assumes that the people of Spokane would, if an election were called, legalize the operation of pinball machines. They fail to take into consideration that at the election to be called they, by their vote, might make the operation of pinball machines within the City of Spokane unlawful, the same as the state law is claimed to do by the Supreme Court. In any event, the Supreme Court is in error in assuming that the citizens of Spokane would endeavor to legalize the operation of pinball machines, for such an assumption is assuming facts not in existence, not in the record, wholly conjectural and imaginary, and by that assumption the Supreme Court of the state has in fact placed a prohibition upon the right of referendum within the State of Washington.

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It is respectfully called to the Court's attention that in addition to the reasons heretofore cited, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States, the Supreme Court of the State of Washington in fact found a violation of the criminal statute, in an equity proceedings by "judicial notice" rather than upon any evidence in the record. Such a finding or judgment is in fact a violation of the due process clause as tested and laid down by this Court in the case of *Anderson National Bank* v. *Luckett*, 321 U. S. 233, p. 246; 88 Law Ed. 692, p. 704, when this Court stated:

> "What is due process . . . must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circumstances which may render the proceedings appropriate to the nature of the case . . . The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the rights for which constitutional protection is invoked."

The State Supreme Court by virtue of its decision held in effect that the appellants have violated the criminal statute and are guilty of a crime without allowing appellants the right to defend themselves, all of which was done in an equity proceeding (R. 88). It was specifically requested by the appellants that in the event the State Supreme Court should reverse the case, then in that event the cause be remanded to the trial court to take additional testimony to establish whether or not pinball machines were "in fact" in violation of Remington's Revised Statutes 2472, but such request was denied by the state court. (R. 88) The decisions of the state are uniform in holding that a court of equity in an injunction proceedings is limited to the function of establishing whether or not the statute or ordinance is valid or invalid and may not inquire into the question of fact whether in fact a crime has been committed, such question of fact being limited to the forum of a criminal prosecution.

SPECIFICATIONS OF ASSIGNED ERRORS

(e) A specification of the assigned errors that are intended to be urged are as follows:

I.

That the Supreme Court of the State of Washington erred as a matter of law in holding that the citizens of the City of Spokane, Washington, did not have the right to exercise the privilege of referendum as granted by the Constitution of the State of Washington, Article 11, Section X, as well as Section 83, Article IX of the Charter of the City of Spokane, and Sections 12 and 13 of Article III of the City Charter of Spokane, and such error of law being in fact a violation of the due process clause of the Fourteenth Amendment of the United States Constitution.

II.

That the Supreme Court of the State of Washington erred as a matter of law in concluding that Remington's Revised Statute 2472, being the Laws of 1909, were not in fact superseded and repealed by Remington's Revised Statutes 2472-1 and 2472-2, the Laws of 1937, as well as Remington's Revised Statute 8370-100, being the Laws of 1941, and that such fact constitutes a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

III.

That the Supreme Court of the State of Washington erred as a matter of law when the court sitting in equity, with its sole province being limited to the consideration of the validity or invalidity of a state statute, arbitrarily ruled upon a question of fact not before the Court, and the decision of which question of fact was solely a proper function of a jury considering a claimed violation of the statute

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under consideration, and such fact constitutes a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

IV.

The Supreme Court of the State of Washington erred as a matter of law in failing to dismiss the appeal of the City of Spokane in accordance with plaintiffs' and petitioners' motion, and that such failure to dismiss the appeal of the City of Spokane constitutes a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

V.

For errors apparent of record.

ARGUMENT

Inasmuch as this brief is limited in its province to argument in opposition to appellees' statement making against the jurisdiction of this Court or in the alternative a motion to dismiss or affirm, and strictly speaking is not a brief on the merits as contemplated by Rule 27, the argument at this time will be limited to (a) a consideration of appellees' authorities submitted in its motion to dismiss or affirm, and (b) reiterating appellants' position as to the sufficiency of appellants' statement as to jurisdiction.

Taking up the first allegations as contained in appellees' motion and referring specifically to paragraph 1 therein, it is submitted that appellants' affidavit (R. 152, 153), in relation to the subject matter, is a sufficient answer to the matter therein contained. In any event, appellees are not prejudiced in that when the purported missing matter was called to appellants' attention duplicate copies were served upon appellees. Paragraphs 2, 3, 4, 5, 6, 7 and 8 are subse-

quently covered in appellants' argument as contained in this brief.

(a) In the case of *Hiawassee River Power Co.* v. *Carolina Tennessee Power Co.*, 252 U. S. 341; 64 Law Ed. 601; 40 Sup. Ct. 330, the right under the federal constitution was not necessarily involved and objection as to the admissibility of certain evidence was directed to the state constitution rather than to the federal constitution. Likewise, there was no reference made to the violation of any portion of the Fourteenth Amendment. In the case at bar a substantial federal question was specifically raised in appellants' pleadings in the first instance in the original petition (R. 6), and such federal question was specifically passed upon by the trial court (R. 38 to 54), and likewise passed upon by the state supreme court (R. 88).

In the case of *Hulbert* v. *City of Chicago*, 202 U. S. 275, 50 L. Ed. 1026, 26 S. Ct. 617, it specifically shows that in the bill of exceptions plaintiff in error did not bring to the attention of the trial court that any of the proceedings were contrary to the Fourteenth Amendment to the Consitution of the United States, and therefore that there was no federal question either before the trial court or the state supreme court. It is not apparent to the appellants how this case is of any assistance to the appellees in their motion to dismiss or affirm.

Neither is it seen how the case of *Whitney* v. *California*, 274 U. S. 357; 71 Law Ed. 1095; 47 S. Ct. 641, is of any assistance to the appellees. However, it is interesting to note the following language of the opinion:

> "And here, since it appears from the statement in the order of the court of appeal that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the 14th Amendment, was considered and passed upon by that court,—this being a Federal question constituting an appropriate ground

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> for a review of the judgment,—we conclude that this court has acquired jurisdiction under the writ of error."
> *Whitney* v. *Cal.* 274 U. S. 357; 71 L. Ed. 1095; 47 S. Ct. 641.

Likewise in the case of *Charleston Federal Savings & Loan* v. *Alderson*, 324 U. S. 182; 65 S. Ct. 624; 89 Law Ed. 857, we do not see how this case is helpful to appellees in their motion inasmuch as this court did decide the case on its merits. It is true that the appeal was dismissed but the court took jurisdiction by virtue of writ of certiorari as provided in the statute, and again the language of the court in this case appears to fortify appellants' position that this court has jurisdiction, when this court stated in the Charleston case:

> "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised when such question appears to have been actually considered and decided by that court.
> *Charleston Fed. Sav. & Loan* v. *Alderson*, 324 U. S. 182; 65 S. Ct. 624; 89 L. Ed. 857, p. 861

The case of *Gorman* v. *Washington University*, 316 U. S. 98; 62 S. Ct. 624; 86 L. Ed. 1300, is not at all in point or analogous to the situation in the case at bar. It was conceded as shown by the record that the decision of the lower court was not a decision of the highest court of the state of which a decision could be had. In other words, appellants in that case did not exhaust their remedies in the lower court. There is no such question raised, intimated or inferred by the appellees that such is the situation of the present case.

Re the case of *Christman* v. *Miller*, 197 U. S. 313; 25 S. Ct. 353; 49 L. Ed. 770, it is submitted to this court that the above cited case is in no manner analogous to the situation

of the case at bar. The only statement that is made in the *Christman* case is that the United States Supreme Court will not review questions of fact of the state supreme court but accepts the conclusions of the state tribunal as final. It is not seen by appellants how this case in any manner can assist as an authority one way or another in settling the question as to whether this court has jurisdiction in the case at bar.

Neither is the case of *American Ry. Express Co.* v. *Commonwealth of Kentucky*, 273 U. S. 269; 47 S. Ct. 432; 71 L. Ed. 639, in any manner analogous to the case at bar in that the *American Ry. Express* v. *Kentucky* case comes before the court on a writ of certiorari and not on appeal. It is interesting, however, to note that this court does state in the *Railway Express* case:

> "Save in exceptional circumstances not now present we must accept as controlling the decision of the state courts upon questions of local law."
>
> *American Ry. Express* v. *Kentucky*, 273 U. S. 269; 47 S. Ct. 432; 71 L. Ed. 639

Applying the above principle of this court to the present appeal as previously pointed out in appellants' assignments of errors (assignment 3, R. 95) it seems that the state supreme court specifically violated the due process clause of the Fourteenth Amendment by finding a criminal violation of a statute through judicial notice in an equity proceedings in which appellants had no right to defend themselves and when such inquiry should have been confined to whether or not the statute in question was valid or invalid and not decide by judicial notice a question of fact that a crime is or was committed.

The state decisions holding the above statement to be a law are unanimous and without a single contradiction, as set out in the following cases:

Ajax v. *Gregory*, 177 Wash. 465, at p. 476; 32 Pac. (2) 560

Great Northern Ry. v. *State*, 184 Wash. 648 at p. 652; 62 Pac. (2) 1274

State ex rel Potter v. *Maybury*, 161 Wash. 142 at p. 149; 296 Pac. 566

Brennen v. *Seattle*, 151 Wash. 665 at p. 668; 276 Pac. 886

Referring again to the authoritative weight of *American Railway Express Company* v. *Kentucky* and the language therein cited, when it states:

> "This court will interfere where there is a clear conflict with fundamental principles which have been established in our system of jurisprudence, for the protection and enforcement of private rights."
> *American Ry. Express* v. *Kentucky*, 71 Law Ed. 639 at p. 641; 273 U. S. at p. 273

In the case of *Knights of Pythias* v. *Meyer*, as cited by appellees to sustain their position and reported in 265 U. S. 30; 40 S. Ct. 432; 68 Law Ed. 885, it is to be noted that this case was heard by this court on the merits. It is true that the application to this court was by writ of error and that the court in fact heard it on writ of certiorari rather than a writ of error. This was due not by virtue of the fact that the court did not have jurisdiction but rather it was heard on a writ of certiorari only because there was a change of federal procedure law which this court interpreted that the matter was more properly before it on certiorari than on appeal.

In the case of *First National Bank of Garnett* v. *Ayers*, 160 U. S. 660; 16 S. Ct. 412; 40 L. Ed. 573, it is contended that this case is not at all appropriate to the question before the court on appellees' motion in that no question as to jurisdiction is anywhere discussed in the decision.

(b) Appellants' statement as to jurisdiction (R. 102-120) and authorities therein cited reiterate the previous decisions of this court why the case at bar should be heard

by the court on appeal. In addition to the authorities previously submitted in appellants' statement as to jurisdiction, which are incorporated in and made a part of this brief by reference, appellants submit the following authorities why this court has jurisdiction and should hear this case and that appellants as a matter of right are entitled to have the case heard under the doctrine of *Angel* v. *Bullington*, 330 U. S. 183; 91 Law Ed. 832.

> "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. . . . It is a requirement that cannot be deemed to be satisfied by mere notice and hearing . . . which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception. . . . Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of . . . administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, whether through its legislature, *through its courts*, or through its *executive or administrative officers.*"
>
> *Mooney* v. *Holohan*, 294 U. S. 103; 79 Law Ed. 791 p. 794
>
> *Smith* v. *Texas*, 85 Law Ed. 84; 61 S. Ct. 164
>
> "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in Virginia v. Rives, 100 U. S. 313, 318, 25 L. Ed. 667, 669 (1880), this court stated: 'It is doubtless true that a State may act through different agen-

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cies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another.' In Ex Parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, 679 (1880), the Court observed: 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way.' In the Civil Rights Cases, 109 U. S. 3, 11, 17, 27 L. Ed. 835, 839, 841 (1883) this Court pointed out that the Amendment makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs, or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion.

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In Twining v. New Jersey, 211 U. S. 78, 90, 91, 53 L. Ed. 97, 102, 103, 29 S. Ct. 14 (1908), the Court said: 'The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State.' In Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113 (1930), the Court, through Mr. Justice Brandeis, stated: 'The Federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.' Further examples of such declarations in the opinions of this Court are not lacking.

One of the earliest applications of the prohibitions contained in the Fourteenth Amendment to action of state judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken

by a judicial official in the absence of statute. Thus, in Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1880), this Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. In the same volume of the reports, the Court in Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676, supra, held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107 supra. Cf. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1878).

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265 (1923). And see Frank v. Mangum, 237 U. S. 309, 59 L. Ed. 969, 35 S. Ct. 582 (1915). Convictions obtained by coerced confessions, by the use of perjured testimony known by the prosecution to be such, or without the effective assistance of counsel, have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may

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result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. Thus, in American Federation of Labor v. Swing, 312 U. S. 231, 85 L. Ed. 855, 61 S. Ct. 568 (1941), enforcement by state courts of the common-law policy of the state, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. In Cantwell v. Connecticut, 310 U. S. 296, 84 L. Ed. 1213, 60 S. Ct. 900, 128 ALR 1352 (1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In Bridges v. California, 314 U. S. 262, 86 L. Ed. 192, 62 S. Ct. 190, 159 ALR 1346 (1941), enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment. And cf. Chicago, B. & Q. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government. *Shelley* v. *Kraemer*, 334 U. S. 1; 92 L. Ed. 1161, p. 1181, 1182, 1183

In the case of *Illinois* v. *Board of Education*, 92 Law Ed. 649; 333 U. S. 203, a motion there as here was made by the appellees to dismiss the appeal on the ground that there

was no jurisdiction, and this Court, speaking in that regard, stated:

> "But the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of 28 USCA Sec. 344(a)."

We respectfully submit to this Court that the above cited case is practically on all fours with the case at bar, that the language used in *Illinois* v. *Board of Education* can be lifted from that decision and applied specifically to this case.

In approaching cases such as this (violation of the Fourteenth Amendment) in which federal constitutional rights are asserted, it is incumbent upon us to inquire not merely whether those rights have been denied in express terms but whether they have been denied in *substance and effect.* We must review independently both the legal issues and those factual matters with which they are comingled.

Oyama v. *California*, 92 L. Ed. 249, p. 254, 332 U. S. 632 at p. 636
U. S. v. *Phelan*, 92 Law Ed. 1614, p. 1626, 334 U. S. 624, p. 640

For the sake of argument, conceding but not admitting appellees' position that since the State Supreme Court was silent as to the violation of the Fourteenth Amendment, then by virtue of such silence this Court is foreclosed from considering alleged violations as specifically set out in appellants' pleadings, which alleged violations were found to occur by the trial court. In other words, if the state court should by its silence ignore the federal question specifically pleaded, relied upon and considered by the trial court, would such silence constitute a bar to appellants

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here because the federal question was not discussed by the State Supreme Court at such length as appellees think necessary and in such detail as likewise thought necessary? Such is not the rule of this Court and may it never be the rule that a State Supreme Court bind and shackle the hands of this Court by virtue of its silence.

> "Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."
> *Urie* v. *Thompson*, 93 Law Ed. Ad. Op. 927 at p. 935

To recognize any rule to the contrary would forever foreclose an appellant in this Court by virtue of the state court's silence on the federal question whether such silence is attributed to indifference, neglect or refusal to speak.

> *Brown* v. *Western Railway of Alabama*, 94 Law Ed. Ad. Op. p. 93 at p. 95
> "The fact that the state court purported to rest its decision largely on state law does not eliminate our duty to consider the question to the extent that it arises under federal law. . . . It is, of course, for us to examine whether questions of federal law were necessarily, although only impliedly, adjudicated by the state court."
> *Grand River Dam Authority* v. *Grand-Hydro*, 93 Law Ed. Ad. Op. p. 81 at p. 86

In conclusion, it is respectfully submitted to this Court that appellees in no manner sought to distinguish the authorities cited by the appellants sustaining the statement as to jurisdiction, and that such authorities by themselves are sufficient to give this Court jurisdiction. It was sincerely hoped by appellants that the appellees would in some manner seek to distinguish the doctrine as established by this Court in the case of *Angel* v. *Bullington*, where this Court so specifically held that appellants in the situation as

exists in the case at bar could appeal to this Court not by grace of the Court but as and by virtue of an absolute right under the federal laws.

Respectfully submitted,

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